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THE INCREASED CONTROL OF STATE ACTIVITIES BY THE FEDERAL COURTS

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The increased control, since the adoption of the first twelve amendments to the Constitution of the United States, of state activities by the federal authorities is not because of any recent increase of federal power. There has been no increase of federal power since the adoption of the thirteenth, fourteenth and fifteenth amendments to the Constitution of the United States. All the powers given to the federal government permitting control by it of state action is found in the constitution. If power is not delegated by the constitution to the national government it does not possess it at all; for all powers are reserved to the states or to the people thereof which have not been delegated to the government of the United States by that instrument. The acts of congress passed to enforce the powers delegated to the United States by the constitution do not create or confer powers not delegated by the constitution. But with the adoption of the last three amendments to the constitution, particularly the fourteenth, the powers delegated to the national government were greatly increased, and with such increase, following the legislation of congress to enforce the same, came greatly increased control of state activities by the federal courts. Before the adoption of these amendments the greater part of federal interference with state action arose out of the commerce clause of the constitution and the inhibition contained therein against the passing by any state of any *ex post facto* law, or law impairing the obligation of contracts. The first twelve amendments to the constitution did not restrict state action, and the first ten amendments are only a limitation upon the powers of the federal government.

The fourteenth amendment to the constitution did not create new privileges and immunities of citizens of the United States; nor did it add to the rights of any person concerning life, liberty or property; nor did it provide any new process of law; but it gave to the national

government the power to control state action abridging such privileges and immunities; to prevent state action depriving any person of life, liberty or property without due process of law, and to prevent denial by the states to any person of the equal protection of the laws. The powers already possessed by the national government under the constitution as originally adopted were greatly increased by the fourteenth amendment, which gave it power to review and annul all action of the states concerning the privileges, immunities and rights guaranteed thereby. It can be seen that the powers reserved to the states were, by this amendment, quite limited, and that those delegated by it to the national government embraced almost all the rights of the individual.

Whether it was the part of wisdom to incorporate this amendment into the organic law is no longer a question open to discussion. The people would not today eliminate it even were the negro not an element to be taken into consideration. Under the wise and temperate construction placed upon it by the Supreme Court of the United States, always with considerate regard to the rights of the states and in a spirit of fairness and comity, the people have come to believe in its beneficence and to look upon it as one of the greatest safeguards of all that is held most dear by them—life, liberty, property and the equal protection of the laws. We have heard it said sometimes that the Supreme Court of the United States has, by construction, whittled away the constitution. An unbiased and careful review of the decisions of that court will show that this statement is entirely inaccurate. Beginning with the earliest decisions of the court, passing down through the dark days of the civil war to the present moment, it has "hewed to the line" regardless of where the chips would fall. Prior political association of its judges has not influenced its decisions; the intensity of sectional feeling, at times widespread and violent, has not deterred it from duty; powerful partisan influences have been unavailing to cause it to swerve from the line of correct decision. The permanency of our government rests with the Supreme Court of the United States. It is the balance wheel holding in place and steady the machinery of government. Without the Supreme Court of the United States, the structure would, from its own weight and its inherent opposing and conflicting elements, fall to pieces in hopeless wreck.

I shall not in the time allotted for this paper attempt a discussion of the increase of federal influence and power under the commerce

clause of the constitution, or of federal control of state action impairing the obligation of contracts, but shall confine myself principally to a discussion of the control of state action in the regulation of railroads and other public utilities by the federal courts.

It is no longer questioned that the federal courts are invested with the power and that it is their duty to declare an act of congress, as well as an act of the legislature of a state, which is in conflict with and repugnant to the federal constitution, null and void. Chief Justice Marshall said in *Maybury v. Madison*, 1 Cranch, 137, "It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide the case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. . . . If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act of the legislature, must govern the case to which they both apply. . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it."

In the case of *Cohen v. Virginia*, 6 Wheat., 264, the great Chief Justice, again discussing this question, said: "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever difficulties a case may be attended, we must decide it if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."

This language is quoted in the recent important case, *Ex parte Young*, 209 U. S., 123–204. In that case Mr. Justice Peckham, speaking for the court, said: "The question of jurisdiction, whether of the circuit court or of this court, is frequently a delicate matter

to deal with. . . . It is a question, however, which we are called upon, and which it is our duty, to decide."

Article 6 of the constitution provides that, "This constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." And in article 3 of the constitution it is provided that the judicial power of the United States, "shall be invested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish." The congress has ordained and established the circuit courts of the United States and has conferred upon them jurisdiction to pass upon and determine, in the first instance, whether any act of congress or of any state is in conflict with the constitution of the United States, and to declare it null and void, if it is. The act of congress establishing the circuit courts, gives them jurisdiction of controversies between citizens of different states where the jurisdictional amount is involved, or where the case arises under the constitution or laws of the United States. Cases are held to arise under the constitution or laws of the United States when it appears from the questions involved that some right will be defeated by one construction of the constitution or sustained by another.

The constitution of the United States has been the supreme law of the land for more than a century and a quarter, and during all of this time the Supreme Court of the United States has, when the question has been brought before it for decision, exercised the jurisdiction to declare the legislation of congress unconstitutional and void, as well as that of the states, whenever it was found to conflict with the constitution of the United States. The highest courts of the states have followed the Supreme Court of the United States in this construction of the constitution where they have not gone ahead of it in such construction. In fact, the Supreme Court of the United States was not the first court to decide that the judiciary is empowered to declare unconstitutional and void legislation which contravened the constitution. The courts of New Jersey were, perhaps, the first to announce this principle, but there shortly followed the courts of Virginia, South Carolina, Rhode Island, Pennsylvania, North Carolina and others.

We must conclude, I think, from the foregoing that the federal courts are clothed, under the constitution, with power to declare

the unconstitutionality of state action, whether legislative or judicial, and to determine whether it deprives the person affected of life, liberty or property without due process of law, or denies to him the equal protection of the laws. Until the adoption of the fourteenth amendment to the constitution of the United States, by which the states were forbidden to deprive any person of life, liberty or property without due process of law, or to deny to any person the equal protection of the laws, the federal authorities were powerless to prevent state action. Reliance for the protection of life, liberty and property had, until then, to be placed entirely upon the state laws; and until then the state laws were believed to be sufficient to afford such protection. Following the civil war of 1861–1865 and the emancipation of the negro race in the south, however, the dominant party, then overwhelmingly in control of political affairs in the country, conceived that it was necessary for the protection of the negro that there should be added to the constitution of the United States an amendment giving the national government the power to control the states in their dealings with the negro; and, for the purpose of acquiring this power to so control the states. the fourteenth amendment was adopted, and became a most important part of the supreme law of the land. The far reaching importance of this amendment was not at the time fully realized, certainly not generally so; but it was soon seen that because of its application to *all persons* the federal powers were greatly increased, particularly in respect to control of state action, in the most vital and important concerns of the people. The most ardent supporters of a strong central government never dreamed that the provisions of this amendment could be incorporated into the constitution originally, and nothing of the kind was then proposed. At the time of the adoption of the constitution it is not believed that any one of the original states would have voted for its adoption with this amendment in it.

The fourteenth amendment was the offspring of the bitter feeling engendered by the bloodiest war of modern times. It must be admitted, however, that "it is now the broadest and strongest guarantee of fundamental rights under our system of government." The citizen can now rely upon the uniform decisions of the highest court in the land to determine what are the privileges and immunities guaranteed to him by this amendment, which cannot be abridged by the states; and every person within the territorial limits of the United States can now, in like manner, rely upon the uniform deci-

sions of this court for protection of life, liberty and property against the action of the states or any of them without due process of law.

The increased control of state activities by the federal courts consequent upon the adoption of the fourteenth amendment is seen in the early and continued crowded condition of the dockets of the Supreme Court of the United States with cases arising out of it requiring its construction and application. While many matters of controversy concerning this amendment have been settled by that court, there are almost constantly arising new contentions of great importance, some of them involving questions of the powers of the states, under the constitution, to control affairs within their territorial limits, and the right and duty of the federal authorities, at the instance of an individual litigant, to decide the contention. A natural feeling of state pride, as well as of the state's interest in the action of its legislature, its courts and officials, have heretofore, in some instances, brought about sharp and sometimes bitter controversies; and this may be expected to continue as long as like conditions arise. In the development of the country by the application of steam and electric power, mechanical invention, the opening of the plains and the forests to settlement for homes and for agriculture, the utilization of our rivers for the purposes of transportation, and the rapid growth of industries all over the land, perplexing questions have arisen and will necessarily continue to arise as to the construction and application of the principles of the fourteenth amendment, which must be settled by the Supreme Court of the United States, made by the constitution the final arbiter of the same.

My confidence in the Supreme Court of the United States and my faith in the people, their high regard for the law, their justified confidence in our judiciary, and their love of peace impel me to say that I look forward to the future with a firm conviction that the Supreme Court of the United States will continue to construe and apply the constitution to conditions as they may arise, preserving, with due regard to the states, all the rights reserved to them, at the same time strictly maintaining and upholding the powers delegated to the national government; that our continued prosperity is assured and that domestic peace is permanent.

The attention of the country has been recently sharply called to the matter of control of state activities by the federal courts in several cases decided by the Supreme Court. Several states, notably Minnesota, Alabama, North Carolina and Virginia, by means of

statutes and constitutional enactments, undertook to regulate and control the railroads being operated in their respective territories; particularly to fix the maximum rates of charges for the transportation of passengers and freights from one point to another within their boundaries. These rates were, it was contended by the railroads, so low that, if enforced, the result would be the confiscation of their property; that thereby they would be deprived of their property without due process of law, and would be denied the equal protection of the laws. Attempts were made by the officials of these various states to enforce these statutes and constitutional provisions, when the railroad companies instituted suits in the federal courts, asking that the state's officials, charged with the duty under the laws of the states, of enforcing these rates, be enjoined from carrying the same into operation; thus raising the issue squarely as to the constitutionality of these statutes and constitutional provisions; that is, whether the same were violative of the fourteenth amendment, in that they would operate to deprive the railroads of their property without due process of law and would deny to them the equal protection of the laws.

Among the early cases involving the construction of the fourteenth amendment by the Supreme Court of the United States was the case of *Munn v. Illinois*, 94 U. S., 43–47, decided in 1877. Chief Justice Waite said, in rendering the opinion in this case, speaking of the power of the state to fix maximum rates of charges by the elevator companies in the city of Chicago, "We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts." He again said in one of the Granger Cases, *Piek v. Chicago, etc., Ry. Co.*, 94 U. S., 164–178, "Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." Unquestionably, it is sound law that the states, acting through their legislatures or other agencies, such as commissions, can establish intrastate rates of charges controlling and regulating public service corporations—those in which the public have an interest; but they must be such as are reasonable, not such as confiscate the property of the corporations, not such as deprive them of their property without due process of law or as deny to them the

equal protection of the laws. It was only necessary for the court in the case of *Munn v. Illinois* to decide this much, as it was held in that case that the rates of charges fixed by the Illinois act were reasonable. This case and the case of *Piek v. Chicago*, caused consternation to the business interests of the country and invited the legislatures of many of the states to enact such statutes of oppression against corporations, particularly against railroad corporations, that for a time the prosperity of the country was very seriously effected. Capitalists refused to invest their money in the building of new railroads or in the securities of the old ones. In this condition of affairs the cases known as the Railroad Commission Cases, *Stone v. Farmers Loan & Trust Company*, 116 U. S., 307–347, were decided by the Supreme Court, modifying and limiting the case of *Munn v. Illinois*. Chief Justice Waite, again speaking for the court, said, "This power to repudiate is not a power to destroy, and limitation is not the equivalent of confiscation." This case was followed by many others deciding that the legislatures of the states must be restricted to reasonable limits in the establishment of rates of charges by railroads for the transportation of passengers and freight; and that the Supreme Court had the jurisdiction ultimately to review and determine for itself, as a judicial question, the reasonableness of such rates, and whether they would operate to deprive the railroad companies of their property without due process of law, or to deprive them of the equal protection of the laws. In the case of *Chicago, etc., Railway Company v. Minnesota*, 134 U. S., 418, the court held that the legislation, called in question in that case, was unconstitutional and void on the ground that the rates fixed by it were unreasonable. In the case of *Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362, this doctrine was clearly and distinctly announced, Mr. Justice Brewer writing the opinion for the whole court; and in the case of *Covington v. Sanford*, 164 U. S., 578, Mr. Justice Harland, speaking for an unanimous court, said, "There is remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one and hold such acts of legislation to be in conflict with the constitution of the United States as depriving the companies of their property without due process of law and as depriving them of the equal protection of the laws."

In the case of *Smythe v. Ames*, 169 U. S., 466–546, known as the Nebraska Maximum Rate Case, it was held that the state had the right to fix reasonable rates of charges, but it was said, "The idea that any legislature, state or federal, can conclusively determine for the people and the courts that what it may enact in the form of law, or what it authorizes its agents to do, is consistent with fundamental law, is in opposition to our institutions, as the duty rests on all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them, depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The last cases upon this question, decided by the Supreme Court of the United States, are *Ex Parte Young*, 209 U. S., 123–204, and *Hunter v. Wood*, 209 U. S., 205–211. In the first of these cases it was insisted that the question of whether the rates fixed by the Minnesota act, or the railroad commission, was so low as to be confiscatory, and that this question was not a federal question. The court said that, "The question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law; and although that question might incidentally involve a question of fact, its solution, nevertheless, is one which raises a federal question. . . . The sufficiency of rates with reference to the federal constitution is a judicial question and one over which federal courts have jurisdiction by reason of its federal nature." These cases decided another point of great interest and importance. The legislatures of the states of Minnesota and North Carolina had not only fixed rates so low that the railroad companies resisted them as being confiscatory, but they had prescribed for a violation of the rate clauses of the acts, as it was claimed by the railroads, very excessive and exorbitants fines, penalties, forfeitures and imprisonment; and the contention was made by the railroads that such fines, penalties and forfeitures were so excessive and exorbitant that they were in violation of and repugnant to the fourteenth amendment. The Supreme Court had not before passed upon this contention although

it had been discussed by it in another case. After a most thorough and exhaustive argument and consideration of the question, it was held, with almost unanimity, only one of the judges dissenting, "That the provisions of the acts relating to the enforcements of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, and without regard to the question of the insufficiency of those rates."

There is nothing, it is believed, in the Virginia Rate Cases, recently decided by the Supreme Court of the United States, to modify the cases cited in this paper. Those cases do, however, show the considerate regard entertained by the Supreme Court for the state courts; for the principal questions involved in these cases are left to be first determined by the highest court of the state.

In concluding this paper, I wish to say that it is my belief that the fourteenth amendment to the constitution of the United States which delegates to the federal supreme court the ultimate right and power to mark out the line separating the powers of the states from those of the national government, is the means whereby our system of government will be perpetuated and the freedom and liberty of the people will be preserved.